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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 35559

**SARATOGA AND NORTH CREEK RAILWAY, LLC
—OPERATION EXEMPTION—
TAHAWUS LINE**

**VERIFIED NOTICE OF EXEMPTION
PURSUANT TO 49 U.S.C. 10902 and 49 CFR 1150.41**

**REPLY TO PROTEST
OF PROTECT THE ADIRONDACKS! INC.**

INTERESTED
Part of
Public Record

Submitted By:

John D. Heffner
Strasburger & Price
1700 K Street, N.W.
Suite 640
Washington, D.C. 20006
(202) 742-8607

Counsel for Petitioner

Dated: November 21, 2011

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—OPERATION EXEMPTION—
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INTRODUCTION

On November 11, 2011, Protect the Adirondacks! Inc., a New York not-for-profit conservation group (“Protect”), submitted a seven page letter to the Board protesting the Verified Notice of Exemption (“NOE”) for common carrier operation of the Tahawus Line (“the Line”) filed by Saratoga and North Creek Railway, LLC (“Saratoga”) on October 25, 2011. Absent any adverse action by the Board, that notice is effective on November 24, 2011.

The Board should reject out of hand Protect’s Protest for the simple reason it has not shown any basis for relief. Protect has not sought to stay this transaction and its Protest does not address the Board’s standards for obtaining a stay.

Moreover, Protect has not alleged, let alone shown, any basis for rejection of the NOE or revocation of the exemption once it becomes effective.

BACKGROUND

Saratoga is a Board authorized class III short line railroad having instituted operations over two contiguous segments of railroad between Saratoga Springs and North Creek, NY, pursuant to two exemptions issued by the Board on June 1, 2011.¹ On October 25, 2011, it filed the subject NOE to extend its common carrier operations over a 29.71 mile long private line of railroad formerly owned by Kronos (US), Inc., a subsidiary of NL Industries (“NL”). NL currently owns and maintains mining property and other resources and facilities located at the northern terminus of this track segment. NL sold the subject segment of railroad to Saratoga on November 4, 2011.²

Saratoga’s acquisition and operation of this entire line of railroad from Saratoga Springs all the way to its most northerly terminus at Newcomb has substantial public agency support in New York State. The Town of Corinth chose

¹ See Saratoga & N. Creek Ry.—Acquis. & Operation Exemption—Del. & Hudson Ry., FD 355_00 (STB served June 1, 2011) and Saratoga & N. Creek Ry., LLC—Operation Exemption—Warren Cnty., N.Y., FD 35500 (Sub-No. 1) (STB served June 1, 2011).

² No Board authority was required for Saratoga to acquire this private segment of railroad. B. Willis, C.P.A., Inc.—Petition for Declaratory Order, FD No. 34013 (STB served Oct. 3, 2001) (B. Willis), *aff’d sub nom. B. Willis, C.P.A., Inc. v. STB*, 51 Fed Appx. 321 (D.C. Cir. 2002).

Saratoga as the operator for the segment it owns after going through a thorough request for proposal process. Similarly, Warren County selected Saratoga for its segment. Moreover, the State of New York Department of Transportation granted an exemption from section 18 of New York State Transportation Law, giving the State a right of first refusal to acquire abandoned railroad rights of way, to permit the sale from NL to Saratoga to proceed without regard to that process. Saratoga's acquisition and operation also has the support of the Essex County Industrial Development Agency, which previously waived its right of first refusal to acquire the Line in favor of the conveyance to Saratoga.

Protect purports to be interested in conservation. Protect challenges Saratoga's NOE for omitting important information. Significantly, it fails to seek a stay or request its rejection or revocation. Although Protect does not appear to seek any specific relief other than a "careful review" of this matter, Saratoga will treat its Protest as a petition to revoke. Finally, as a matter of clarity and regardless of their accuracy (or lack thereof), many of Protect's assertions address issues that are outside the jurisdiction and/or expertise of the Board. Saratoga will address each of them through argument and the supporting testimony of its marketing vice president Stephen Gregory and comments provided by L. Andrew Fleck, NL's Real Estate Manager.

ARGUMENT

Opponents usually seek to derail short line acquisition and operation transactions urging that the NOE contains false or misleading information and/or the transaction is not appropriate for an exemption because regulation is required.

Under the Board's rules applicable to class exemptions such as that involved here under 49 CFR 1150.41, an exemption will be found void *ab initio* if it contains false or misleading information. However, the Board has held that such information must be *materially* [emphasis supplied] misleading to warrant Board action. San Francisco Bay Railroad-Mare Island-Operation Exemption-California Northern Railroad, FD 35304 (STB served Dec. 6, 2010). And by the term *material*, the Board means that the transaction would not have otherwise qualified for an exemption. Berkshire Scenic Ry. Museum, Inc. v. ICC, 52 F.3d 378 (1st Cir. 1995).

Regarding regulation, the Board may revoke an exemption under 49 U.S.C. §10502(d), if it finds that application of a statutory provision is necessary to carry out the rail transportation policy of 49 U.S.C. §10101 ("RTP"). The Board has previously held that it will look to those portions of the RTP that are relevant or pertinent to the underlying statute—here, 49 U.S.C. § 10902—in considering

petitions to revoke. *Cf. Vill. of Palestine v. ICC*, 936 F.2d 1335 (D.C. Cir. 1991).

The party seeking revocation has the burden of showing that regulation is necessary to carry out the RTP, 49 C.F.R. § 1121.4(f) and petitions to revoke must be based on reasonable, specific concerns demonstrating that reconsideration of the exemption is warranted and more detailed scrutiny of the transaction is necessary. See Consol. Rail Corp.—Trackage Rights Exemption—Mo. Pac. R.R., FD 32662 (STB served June 18, 1998).

With that preface, Saratoga will address each of Protect's allegations to show how it is not entitled to *any* relief:

- Saratoga has omitted important information

Protect wants the Board to believe that Saratoga's NOE is in some way misleading because it claims that NL does not own the entire right of way in "full fee title" and therefore Saratoga's access or ownership rights are in some unexplained way deficient. Among other things, Protect argues that the right of way consists of a mixture of different types of easements over both publicly and private owned lands, that some of these easements were temporary, and that the easements were limited in their purpose (i.e., for hauling ilmenite ore).

Saratoga's response: To the extent that Saratoga's NOE omitted any reference to the real estate interest it acquired, this issue is not "material" because the nature of title to the underlying real estate does not affect Saratoga's right to use the exemption. Real estate titles and other commercial legal matters are beyond the jurisdiction and expertise of the Board and are matters for adjudication under state law in the appropriate forum. *Cf.*, East Penn Railroad, LLC-Abandonment Exemption-In Berks and Montgomery Counties, PA, Docket No. AB-1020X (STB served January 28, 2009, slip op. at 7). Furthermore, there is nothing in the Board's class exemption regulations requiring an applicant to state whether the right of way to be acquired or operated consists of fee or reversionary ownership. In fact, most rail lines in the United States do not have "full fee title" ownership of the underlying right of way, but often operate on easements or other reversionary real estate mechanisms. The only thing remotely relevant is for the applicant to provide the status of any agreement covering acquisition or operation of the line. But Saratoga reads Protect's protest as potentially conceding that NL continued to have some sort of ownership of the property until its sale to Saratoga. Protest at 3-4. The simple fact is that NL had a property interest in the right of way and track structure and Saratoga purchased the interest that NL had. Further, to the extent that the State of New York as the fee owner of certain underlying "public"

lands might have had an interest in acquiring the Line, the State has provided Saratoga and NL with a letter waiving its statutory preferential right-of-acquisition, a strong indication both that the State is aware and supports the conveyance and resumption of rail use as consistent with New York State transportation policy. *See*, letter from New York State Department of Transportation attached as Exhibit A.

- NL is not an active customer. Protect urges that Saratoga's NOE is misleading because NL stopped shipping by rail in 1989. Yet, it concedes that NL continues to ship magnetite ore, albeit by truck. Protest at 3.

Saratoga's response: Saratoga is currently in negotiations with NL in regard to the future sale and transport of processed rock and magnetite utilizing the rail line. *See*, verified statements of Stephen Gregory and letter response by L. Andrew Fleck attached hereto.

- There are no active customers on the Line and substantial rehabilitation would be required. Another one of Protect's inaccuracies is the implication that Saratoga is not entitled to reinstate service because there are no active customers on the Line and rehabilitation would cost at least

\$5 million and take substantial time to complete. Protest at 3-4.

Saratoga response: Protect admits in its letter that another on line customer [Barton Mines] continues to produce some of the best industrial garnets in the world which currently move by truck. But as Mr. Gregory testifies, Saratoga has approached Barton Mines about its transportation needs and that customer is open to resuming the use of rail to move its product. Gregory VS.

In any event whether or not NL and Barton are current rail shippers is beside the point. Under current agency precedent, a party seeking an exemption to acquire and/or operate a rail line does not need to prove a public need. The law places the burden of proving that a transaction does not satisfy the public convenience and necessity on the opponent, here Protect. *See, e.g., Dakota, Minnesota & Eastern Railroad Corporation Construction Into The Powder River Basin*, FD 33407 (STB served Dec. 10, 1998), slip op. at 15-16 (“it is well settled that a showing of public need is not a prerequisite under 49 U.S.C. 10901 and 10502”) and *Riverview Trenton Railroad Company-Petition for Exemption From 49 U.S.C. 10901 to Acquire and Operate a Rail Line in Wayne County, MI*, FD 34040, STB served Nov. 30, 2007, slip op. at 4 (found that the city opposing the transaction had not met its burden). Likewise, Protect has not carried that burden.

Further, the Board does not regulate the cost or standard of repair for a re-opened rail line, as safety regulation is under the purview of the Federal Railroad Administration, and Saratoga is well-versed in FRA regulations.

- Saratoga has not conducted any sort of marketing study for its proposed excursion passenger service.

Saratoga response: None is required. Simply stated, intrastate excursion passenger service is outside the jurisdiction of the Board. Magner-O'Hara Scenic Ry. v. I.C.C., 692 F.2d 441 (6th Cir. 1982). Further, Saratoga in its filing does not indicate that it plans to operate excursion service on the Tahawus line. Instead, the entire filing relates to reopening of the line as a common carrier for freight. While Saratoga might elect to operate excursion service at some point in the future, it has no immediate plans to do so, and even if it did, any marketing study would be proprietary and confidential.

- The subject line is abandoned. Protect continually refers to this line as “an abandoned industrial spur.” Protest at 3-5.

Saratoga response: Protect misunderstands the meaning of the term

“abandoned.” There are many agency and court decisions³ on the issue of what constitutes the “abandonment” of a rail line. A line is considered “abandoned” when the Board has issued a decision authorizing the cessation of service, operations have ceased, tariffs have been canceled, the track has been removed, and the carrier has filed a letter with the Board stating that the abandonment has been consummated. Honey Creek, *supra*, at 4. Inasmuch as this line was a “private railroad” never having been subject to the Board’s entry jurisdiction before the instant transaction, those principles are not applicable to this notice. Nevertheless, an “abandonment” has been considered an intention to cease service permanently. Black, *supra*. That intention is missing here in view of the fact that the track has never been removed and Saratoga has acquired it for the purpose of providing common carrier rail service.

- Applicability of Board environmental and historical regulations:

Protect’s last misunderstanding of federal transportation law is its argument that this transaction is subject to the Board environmental and historic regulations at 49 CFR 1105.7(e) (4) and (5) and 49 CFR

³ See, e.g., Honey Creek Railroad, Inc.-Petition for Declaratory Order, FD 34869 (STB served June 4, 2008, slip op., cited as “Honey Creek”); Black v. Interstate Commerce Commission, 762 F.2d 106 (D.C. Cir. 1985) (cited as “Black”); and Birt v. STB, 90 F.3d 580 (D.C. Cir. 1996).

1105.8(a). More specifically, Protect incorrectly suggests that restoration of service requires an Environmental Assessment or even an Environmental Impact Statement because a resumption of rail service over an “abandoned” rail line would result in an increase in rail traffic and rail yard activity of over 100%. Similarly, Protect argues for the preparation of a Historic Report insofar as the line runs through a State Forest Preserve identified as National Natural Landmark listed on the National Register of Historic Places.

Saratoga’s Response: Protect is unfortunately unfamiliar with agency case law on this issue. Had Protect reviewed precedent such as Morristown & Erie Railway, Inc.-Modified Rail Certificate, FD 34054 (STB served June 22, 2004, slip op., cited as “Morristown & Erie”) and Missouri Central Railroad Company—Acquisition And Operation Exemption—Lines of Union Pacific Railroad, FD 33508 (STB served Sept. 14, 1999, slip op., cited as “Missouri Central”), it would have learned that these environmental and historic requirements are not triggered by this filing.

This transaction involves the restoration of service over an out of service rail line similar to the above-cited cases. As the Board stated in Morristown & Erie,

supra.

For requests to operate an existing rail line pursuant to 49 U.S.C. 10901, the Board prepares an Environmental Assessment if the operation will result in operational changes that exceed certain thresholds. See 49 CFR 1105.6(b) (4), (c) (2) (i). The Board generally does not undertake a case-specific environmental review in such cases if the operational changes would fall below the threshold at 49 CFR 1105.7(e) (5) (A): an increase of at least eight trains a day on the rail line (or three trains a day in a “nonattainment area” under the Clean Air Act), or an increase of 100 percent over the existing rail traffic level. See Lee’s Summit, Mo. v. STB, 231 F.3d 39, 42 (D.C. Cir. 2000) (Lee’s Summit) (affirming the Board’s finding that, where there had been no recent traffic on a rail line that would be reactivated, the relevant threshold for environmental review is eight trains per day). Slip op. at 4.

Saratoga did not provide the frequency of service it intends to provide on this segment in its NOE because the class exemption regulations do not require applicants to provide that sort of information. However, Saratoga intends to operate common carrier freight service on demand, and at well below the eight-trains-per day threshold triggering environmental and historic reporting. Furthermore and contrary to Protect’s assertions, an increase in traffic levels from no service to some level of service does not trigger compliance with the Board’s environmental regulations. As the Board found in Missouri Central, *supra*,

When a line currently carries no traffic, any resumption of service, no matter how small, represents an increase mathematically of infinite magnitude. But, the Cities have cited no instance, nor are we aware of any, where an

increment of one train a day each way as proposed by MCRR has been deemed to suffice to trigger our environmental reporting and documentation requirements. The fact that the 100% standard is paired in the same sentence with an absolute standard of an increase of eight trains a day suggests that the 100% standard applies to an anticipated increment that greatly exceeds the one train a day each way operations proposed by MCRR. Moreover, MCRR's actions are most closely analogous to the situation that arises when a carrier reinstitutes service on a line where service has been discontinued. In such a case, under 49 CFR 1105.7(e) (5) (i) (C), the environmental requirements are not triggered unless the proposed operations will amount to at least eight trains per day. Reading the regulations as a whole, we cannot accept the Cities' interpretation of the environmental report and documentation requirements. Missouri Central, *supra*, slip op. at 7.

Similarly, compliance with the Board's historic preservation regulations is not implicated. The purpose of this transaction is for continued rail operations and Saratoga has no plans to dispose of or alter properties that are 50 years old or older. *See, Missouri Central*, slip op. at 9.

Likewise Protect has shown no basis for regulation. Protect has not shown that Saratoga should be denied the exemption procedures of the I.C.C. Termination Act ("ICCTA") or the Board's class exemption for short line entry transactions. Under the ICCTA, the Board will issue an exemption under the two part test of 49 U.S.C. 10502, when it finds that the application in whole or in part of a provision of this part – (1) is not necessary to carry out the transportation policy of section 10101 of this title; and (2) either the transaction or service is of limited scope; or (B) the application in whole or in part of the provision is not needed to protect

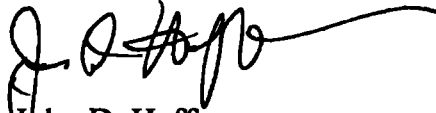
shippers from the abuse of market power.

Protect has not alleged that Saratoga's restoration of service would violate any provision of the Board's RTP. In fact, it would satisfy numerous RTP provisions including, among others, reduced regulatory control over the rail transportation system (sec. 10101(2)), sound economic conditions in transportation and competition between rail and other modes (sec. 10101(5)), reduced regulatory barriers to entry (sec. 10101(7)), honest and efficient management of railroads (sec. 10101(7)), and energy conservation (sec. 10101(14)). Protect has not alleged that operation of this dormant 29.71 mile of railroad restoring service to several shippers is anything but a matter of limited scope. There is no evidence that this application is needed to protect shippers from an abuse of market power as one customer, NL, supports the service.

CONCLUSION

Had it asked for relief, Protect is not entitled to any. Its Protest does not seek a stay of Saratoga's restoration of rail service over the subject trackage. It has not identified any basis for rejecting or revoking its operations exemption. Accordingly, the Board should issue a decision permitting this transaction to go forward as scheduled.

Respectfully submitted,



John D. Heffner
Strasburger & Price
1700 K Street, N.W.
Suite 640
Washington, D.C. 20006
(202) 742-8607
Counsel for Petitioner

Dated: November 21, 2011

CERTIFICATE OF SERVICE

I, John D. Heffner, hereby certifies that I mailed a copy of the "Reply to Protest of Protect the Adirondacks! Inc., to the following person by email transmission and by first class United States mail this 21st day of November 2011.

John W. Caffry, Esq.

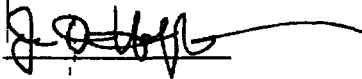
Caffry and Flower,

100 Bay Street

Glens Falls, NY 12801

jcaffry@caffrylawoffice.com

By:



John D. Heffner

VERIFIED STATEMENT

My name is Stephen Gregory, and I am Executive Vice President – Marketing of Iowa Pacific Holdings LLC and its six U. S. railroads, including Saratoga & North Creek Railway LLC. My responsibility is the development of rail freight traffic. I have been employed in the railroad industry for 37 years, having previously served in several positions at Chicago & North Western Transportation Co., then Vice President – Marketing for OmniTRAX Inc. I have been with Iowa Pacific since 2001.

Iowa Pacific's mission since its founding in 2001 has been to identify shortline railroads that offer significant business development potential, either freight or passenger, depending on the properties and their markets. New rail freight traffic development can be an extremely lengthy process, so as a privately-held company we are prepared to take a very long-term view.

For example, our Texas – New Mexico Railroad was acquired in 2002 with marginal freight traffic and major capital requirements. After investing in upgrading the track and facilities, the railroad is poised to experience enormous growth as it participates in the expansion of domestic oil and gas production, almost ten years later.

As we made clear in our presentations to Warren County and the Town of Corinth, which were amply reported in the local media, our vision to develop the County and Town's rail asset was twofold: initial deployment of resources to immediately provide passenger-train service to be followed by freight traffic development. Since the last freight was handled on this line in 1989, we expect that new rail freight will take time to produce and we have made a long-term commitment to do so. This vision will benefit the region as trucks are removed from highways, the environmental benefits of rail transportation are realized, and the viability of the railroad is secured.

The acquisition of the Tahawus Line is completely consistent with this vision. Our initial discussions with NL Industries and Barton Mines indicate there is substantial opportunity for new rail markets for mine tailings as construction aggregates and potentially industrial minerals as well.

VERIFICATION

I, Stephen Gregory, declare under penalty of perjury that the preceding is true and correct. Further, I certify that I am qualified and authorized to file this statement on behalf of the Saratoga & North Creek Railway, LLC. Executed on this 21st day of November 2011.



Stephen Gregory

EXHIBIT A



STATE OF NEW YORK
DEPARTMENT OF TRANSPORTATION
ALBANY, N.Y. 12232
www.nysdot.gov

JOAN McDONALD
COMMISSIONER

ANDREW M. CUOMO
GOVERNOR

September 19, 2011
Mr. Michael G. Sterthous
One Commerce Plaza
Albany, NY 12260

**Re: NL Industries/Kronos; Plancor 1245
29.71 miles, Warren, Hamilton and Essex Counties**

Dear Mr. Sterthous:

We are in receipt of your September 12, 2011 letter requesting that the proposed conveyance of a series of easements or railroad rights of way relative to an approximate 29.71 mile railroad track from North Creek, Warren County to the Tahawus mine site in Newcomb, Essex County known as "Plancor 1245" be exempted from the state's preferential right of acquisition.

According to the provisions of Section 18 of the New York State Transportation Law as amended, a property shall be deemed to be abandoned if, or when:

- Where required by Law, a certificate of abandonment has been issued by the STB, or any other Federal or State Agency having jurisdiction thereof; or
- When such a certificate of abandonment is not so required and the use of such property for railroad transportation purposes has been discontinued with the intent not to resume. Intent not to resume may be inferred from circumstance. Non-use of the property for railroad transportation purposes for two consecutive years shall create a presumption of abandonment.
- The property owner has no definite plans for the use of such property for purposes ordinarily associated with the safe and normal operation of a railroad or associated transportation purpose.

We have reviewed your request, and found that a certificate of abandonment from the STB is not required, but the Line has not been used for transportation purposes at least for the last decade. The property is therefore subject to Section 18. However, Section 18 provides that the sale of abandoned railroad transportation property for continued or resumed rail transportation use may be exempted at the Commissioner's discretion from the preferential right of acquisition. In your letter, you represented that the railroad Right-of-Way will be used to extend the currently operating railroad line from Saratoga Springs to North Creek, operated by Saratoga & North Creek Railway, LLC (SNR). In correspondence dated August 29, 2011, the SNR made a similar

representation, indicating their intent to acquire the subject property for rail transportation purposes.

In view of the above, we have determined that the sale of "Plancor 1245" to SNR shall be exempt from Section 18 and no further action is required.

Since this transaction has been exempted from the preferential rights process, any subsequent sale or conveyance of this Right-of-Way will be subject to further Department review pursuant to Section 18.

If you have questions, or need to discuss the matter further, please don't hesitate to contact me or Mike Younsi at (518) 457- 4763, or via: myounsi@dot.state.ny.us

Sincerely



Raymond F. Hessinger, P.E.,
Director, Freight and Passenger Rail Bureau

Cc: Walter E. Zullig Jr., Esq.



NL INDUSTRIES, INC.
THREE LINCOLN CENTRE
5430 LBJ FREEWAY
SUITE 1700
DALLAS, TEXAS 75240-2697

REAL ESTATE DEPARTMENT
TELEPHONE: 972.450.4288

TELEPHONE FACSIMILE: 972.450.4281

November 21, 2011

Cynthia A. Brown
Chief, Section of Administration
Surface Transportation Board
395 E Street SW
Washington, DC 20423-0001

Re: FD 35559 Saratoga and North Creek Railway LLC
Operation Exemption - File # 231173

Dear Ms. Brown:

I submit this letter in support of the verified notice of exemption ("NOE") filed by Saratoga and North Creek Railway, LLC ("Saratoga") and in response to several inaccuracies in the letter of objection filed by Protect the Adirondacks ("Protect"). I am Real Estate Manager for NL Industries, Inc. ("NL"). I have held this position for the past 11 years and as such am fully knowledgeable of the facts and circumstances surrounding the subject rail line and mine property discussed in the Protect comments.

NL is the owner of significant real estate holdings including, among others, the mine property located at Tahawus, New York in the Town of Newcomb at the northern terminus of the rail line that runs from North Creek to Tahawus. Kronos (US), Inc., as successor in interest to Kronos, Inc. and NL Chemicals, Inc. ("Kronos") is a subsidiary of NL and the former owner of that series of easements and railroad rights of way and rails extending from the terminal connection of the former Delaware and Hudson Railroad at North Creek, New York to the mines of NL at Sanford Lake, Tahawus, New York, traversing a distance more or less of 29.71 miles (the "Tahawus line"). Kronos acquired the Tahawus line from the United States of America by deed dated September 18, 1989. Kronos, in turn, conveyed title to the Tahawus line to Saratoga on or about November 4, 2011.

I reviewed the NOE filed by Saratoga. With respect to any representations Saratoga made regarding Kronos or NL, I see nothing that is either false or misleading. In comparison, however, I identified numerous inaccurate statements in the comment letter filed by Protect. For example, in its comments objecting to the NOE, Protect states that the rail line was limited strictly to hauling ilmenite ore from Tahawus. However, the Final Judgment of Condemnation issued by the United States District Court in or about December 1962, expressly states that the easement over State lands was for the "location, relocation, construction, maintenance, operation and removal of railroad facilities". A copy of that judgment is attached hereto.

Page Two
Cynthia A. Brown

In addition, Protect expresses its opinion that NL has abandoned all operations at the mine property and will "never again haul ore on the rail spur again." However, contrary to this opinion, NL maintains a significant reserve of rock and magnetite on the site which is currently processed on-site and shipped from the site by truck pursuant to private contract. There are also a number of pieces of heavy equipment on site to handle the staging, crushing and screening of such materials prior to off-site transport. Our annual rock/magnetite sales have averaged in excess of \$100,000 over the last 4 years and there remains several more years' worth of reserves. NL is in active negotiations with Saratoga regarding the sale and transport of this material over the rail line.

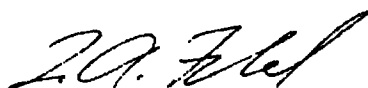
Protect also inaccurately opines that the mine property is "highly contaminated" and disingenuously suggests that it poses a public safety or health risk. This allegation is false. NL has spent over \$4 million reclaiming its mine property and, with the exception of continued site monitoring, NL has completed its remedial obligations to the State. Moreover, should it be required in the future, NL has agreed to provide Saratoga with reasonable and appropriate site access at the northern terminus of the rail line for passenger accommodation.

Finally, Protect mischaracterizes the purpose and intent of the NYS Department of Transportation ("NYSDOT") characterization of the rail line as being abandoned. It is my understanding that the NYS Transportation Law provides the State with a preferential right of acquisition before any abandoned or under-utilized rail property can be disposed of for other than transportation purposes. The purpose of this right appears to be the preservation of rail property and infrastructure for transportation purposes. Indeed, prior to Kronos' transfer of the rail line to Saratoga, we again notified NYSDOT of this transaction and the State issued an exemption of its preferential right of acquisition because operation of the rail line would be resumed. A copy of the NYSDOT exemption is attached here.

I hope the foregoing provides some clarification to the statements made in the Protect letter. Please feel free to contact me should you have any further questions.

Sincerely,

NL INDUSTRIES, INC.



L. Andrew Fleck
Real Estate Manager



STATE OF NEW YORK
DEPARTMENT OF TRANSPORTATION
ALBANY, N.Y. 12232
www.nvsdot.gov

JOAN McDONALD
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ANDREW M. CUOMO
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September 19, 2011
Mr. Michael G. Sterthous
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We have reviewed your request, and found that a certificate of abandonment from the STB is not required, but the Line has not been used for transportation purposes at least for the last decade. The property is therefore subject to Section 18. However, Section 18 provides that the sale of abandoned railroad transportation property for continued or resumed rail transportation use may be exempted at the Commissioner's discretion from the preferential right of acquisition. In your letter, you represented that the railroad Right-of-Way will be used to extend the currently operating railroad line from Saratoga Springs to North Creek, operated by Saratoga & North Creek Railway, LLC (SNR). In correspondence dated August 29, 2011, the SNR made a similar

representation, indicating their intent to acquire the subject property for rail transportation purposes.

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If you have questions, or need to discuss the matter further, please don't hesitate to contact me or Mike Younsi at (518) 457- 4763, or via: myounsi@dot.state.ny.us

Sincerely

A handwritten signature in black ink, appearing to read "Raymond F. Hessinger", written over a horizontal line.

Raymond F. Hessinger, P.E.,
Director, Freight and Passenger Rail Bureau

Cc: Walter E. Zullig Jr., Esq.

UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff

CIVIL No. 4-1

VS

220 ACRES OF LAND, MORE OR LESS,
SITUATE IN ESSEX AND HAMILTON
COUNTIES, STATE OF NEW YORK AND
THE STATE OF NEW YORK, et al,

FINAL JUDGMENT
IN CONDEMNATION

Defendants

It appearing that on the 14th day of October, 1962, a Judgment, based upon a stipulation between Plaintiff, United States of America and Defendant The People of the State of New York, was made and entered herein adjudging the sum of Six Thousand Three Hundred Fifty (\$6,350.00) Dollars, including interest, as the just compensation to be paid by plaintiff to defendant for the acquisition of an easement for a period of 100 years for the location, relocation, construction, maintenance, operation and removal of railroad facilities in, over, upon and across certain lands in the Counties of Essex and Hamilton, New York, owned by the defendant, all as more particularly described in the Complaint herein, and it further appearing that, as directed by said Judgment, plaintiff deposited the sum of \$6,350.00 in the Registry of the Court on the 16th day of November, 1962 following which payment thereof was made to defendant by Registry Check No. 4-1 dated November 19, 1962, receipt for which, dated November 30, 1962, and executed by William D. Mulholland, Assistant Commissioner of Lands and Forests of the State of New York, is attached hereto, and it appearing that, pursuant to said Judgment, the aforesaid easement shall become effective on the date of the entry of a final Judgment herein and shall then supersede an existing

temporary easement for the same purposes and over the same lands as are the subject of this action.

NOW THEREFORE, it is

ORDERED, ADJUDGED AND DECREED:

1. That upon entry of this judgment Plaintiff United States of America is vested with:

An easement for a period of 100 years for the location, relocation, construction, maintenance, operation and removal of railroad facilities in, over, upon and across certain land in the Counties of Essex and Hamilton, New York, which lands are more particularly described in Schedule "A" attached to and made a part of the Complaint herein.

2. That said easement shall supersede an existing temporary easement now held by the United States of America for the same purposes and over the same lands as those herein involved.

3. That said easement is acquired for the public use.

4. That upon the expiration of said easement the lands burdened therewith shall revert to The People of the State of New York free and clear of all claims of the United States of America or anyone claiming through or under the United States of America.

ENTER:

Dated this 10th day of December, 1962.

Stephen M. Lawrence

UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff

CIVIL No. 8431

vs

220 ACRES OF LAND, MORE OR LESS,
SITUATE IN THE COUNTIES OF ESSEX
AND HAMILTON, STATE OF NEW YORK,
AND THE PEOPLE OF THE STATE OF
NEW YORK, et al,

RECEIPT

Defendants

RECEIVED from the United States of America,
Court Registry Check No. 4747, dated November 19, 1962,
in the sum of \$6,350.00 payable to The People of the State
of New York given pursuant to Order of this Court dated
and filed October 17, 1962, in full payment for the
acquisition of an easement for a period of 100 years for
the location, relocation, construction, maintenance,
operation and removal of railroad facilities in, over,
upon and across certain lands situate in the Counties of
Essex and Hamilton, New York owned by the defendant
The People of the State of New York, which said lands are
more particularly described in the Complaint in this
Condemnation action.

Dated this 30 day of November, 1962.

THE PEOPLE OF THE STATE OF NEW YORK

BY: Edward L. ...

Assistant Commissioner For Lands & Forests

NORTHERN DISTRICT OF NEW YORK
STATE OF NEW YORK
COUNTY OF ONONDAGA

ss:

. being duly sworn, deposes and says that ne
nas read the foregoing and knows the contents thereof;
that the same is true to the knowledge of deponent except as to the
matters stated to be alleged upon information and belief and as
to those matters he believes it to be true.

That the reason this affidavit is made by deponent and not by the
plaintiff is that the plaintiff is a corporation sovereign and acts
through its officers and agents, and that deponent is such officer,
to wit, the United States Attorney in and for the Northern District
of New York. That the sources of deponent's knowledge and the grounds
of his belief as to matters alleged upon information and belief are
communications of the proper officers and agents of the Government in
the hands of deponent.

Sworn to before me
this day of
, 19

Notary Public

State of New York
United States District Court
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

Plaintiff

vs.
220 ACRES OF LAND, MORE OR LESS,
SITUATE IN ESSEX AND HAMILTON
COUNTIES, STATE OF NEW YORK AND
THE STATE OF NEW YORK,

Defendants

ORIGINAL

FINAL JUDGMENT IN CONDEMNATION

JUSTIN J. MAHONEY
U. S. Attorney,

Syracuse, N. Y.

Filed 12-10-62
Syracuse, N.Y.

U. S. DISTRICT COURT
N. D. OF N. Y.
F I L E D

DEC 10 1962

Attest: CLERK
W. A. GARDNER

UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff

CIVIL No. 8431

VS

220 ACRES OF LAND, MORE OR LESS,
SITUATE IN THE COUNTIES OF ESSEX
AND HAMILTON, STATE OF NEW YORK
AND THE STATE OF NEW YORK, et al,

Defendants

COMPLAINT IN CONDEMNATION

1. This is an action of a civil nature brought by the United States of America at the request of FRANKLIN FLOETE, Administrator of the General Services Administration of the United States for the taking of certain easement interests in certain property under power of eminent domain and for the ascertainment and award of just compensation to the owners and parties in interest.

2. The authority for the taking is in accordance with the Act of Congress of August 1, 1888 (25 Stat. 377, c. 728) as amended, The Federal Property and Administrative Services Act of 1949, approved June 30, 1949 (63 Stat. 377) as amended, and the Independent Offices Appropriation Act, 1961, approved July 12, 1960 (74 Stat. 425).

3. The public use for which said lands are sought to be acquired is to adequately provide for a railroad line over which strategic materials necessary to the United States of America may be transported, the said railroad line being the existing North Creek - Sanford Lake railroad

4. The estate to be taken for said public use is as follows:

An easement for a period of 100 years for the location, relocation, construction, maintenance, operation and removal of railroad facilities in, over, upon and across certain land in the Counties of Essex and Hamilton, New York, which lands are more particularly described in Schedule "A" attached to and made a part of this Complaint.

5. The State of New York solely has or claims to have an interest in the lands which are the subject of this action.

WHEREFORE, Plaintiff demands judgment that the aforesaid easement interest in the lands described in Schedule "A" attached hereto and made a part hereof be condemned and that the just compensation for the taking thereof be ascertained and awarded and for such other and further relief as may be lawful and proper.

Trial of the issue of just compensation by Jury is hereby demanded by the Plaintiff.

Dated this 16th day of January, 1961.

UNITED STATES OF AMERICA

BY: Theodore F. Bowes

UNITED STATES ATTORNEY in and for
the Northern District of New York
Office and P. O. Address
206 Federal Building
Syracuse 1, New York

EXHIBIT "A"

Description of
LANDS TO BE ACQUIRED FROM THE STATE OF NEW YORK

All this tract or parcel of land situated in the Counties of Essex and Hamilton, Towns of Minerva and Indian Lake, State of New York bounded and described as follows:

Beginning at Station 351 / 20 1/2, being the intersection of the located center line of the North Creek-Sanford Lake Railroad Connection with the southerly line of Lots No. 16 and No. 33 of the lands of the State of New York, being a parcel of land bounded by lines parallel to the located center line of the Railroad Connection and to the widths either side of said center line as given in the following tabulation, and further shown on file drawing 617-37533 entitled "R. O. W. Station 350 / 77 1/2 to Station 1083 / 12 1/2".

Alinement of Center Line				: Width of R. O. W.	
:	:	:	:	:West of	: East of
:	:	:	:	:Center	: Center
:	:Station	:	Distance	:Line	: Line
:	:	:	:	::	:
Tangent	"	351 / 20 1/2			
Curve	2° L	PC.352 / 91	171'	50'	50'
			500'		
Tangent		PT 357 / 91		50'	50'
			1450'		
Curve	2° 30' L	PC 372 / 41		50'	50'
			1500'		
Curve	3° 45' L	POC 387 / 41		50'	50'
			500'		
Tangent		PT 392 / 41		50'	50'
			340.64'		
Curve	3° 30' R	PC 395 / 81.64		50'	50'
			323.71'		
Tangent		PT 399 / 05.35		50'	50'
			207.83'		

		Alinement of Center line		Width of R. O. W.	
		Station	Distance	West of Center Line Ft.	East of Center Line Ft.
Tangent		PT 404 / 27.06	102.94	50'	50'
Curve	8°00' R	PC 405 / 30	300'	50'	50'
Tangent		PT 408 / 30	170'	50'	50'
Curve	7°45' R	PC 410 / 00	400	50'	50'
Tangent		PT 414 / 00	1400	50'	50'
		428 / 00		50'	50'
		428 / 00	219.80	400	50
Curve	6°00' L	PC 430 / 19.80	447.50	400	50
Tangent		PT 434 / 67.30	332.70	400	50
		438 / 00		400	50
		438 / 00	726.90	100	100
Curve	10°00' L	PC 445 / 26.90	340'	100	100
Tangent		(PT 448 / 66.90 So. PT 448 / 69.53 No.)	742.95	100	100
Curve	10°00' R	PC 456 / 12.48	387.52	100	100
		460 / 00		100	100
		460 / 00	112.48	50	50

Alinement of Center Line				Width of R. O. W.	
				West of	East of
		Station	Ft. Distance	Center Line Ft	Center Line Ft
Curve	6°00' L	PC 473 / 30.65		50	50
			660.28		
Tangent		PC 479 / 90.93		50	50
			1358.16		
Curve	5°00' R	PC 493 / 49.09		50	50
			300		
Tangent		PT 496 / 49.09		50	50
			440.54		
Curve	5°00' L	PC 500 / 89.63		50	50
			220		
Tangent		PT 503 / 09.63		50	50
			1165.37		
Curve	5°00' R	PC 514 / 75		50	50
			440.		
Tangent		PT 519 / 15		50	50
		520 / 00	85	50	50
		520 / 00		100	50
			450		
Curve	10°00' R	PC 524 / 50		100	50
		530 / 00	550	100	50
		530 / 00		75	75
			35		
Tangent		PT 530 / 35		75	75
			150		
Curve	10°00' L	PC 531 / 85		75	75
			865		
	8°00' L	POC 540 / 50		75	75
			556.25		
Tangent		PT 546 / 06.25		75	75
			177.25		

		Alinement of Center Line	Width of R. O. W.	
			West of	East
		Distance	Center	of Center
	Station	Ft.	Line Ft.	Line Ft.
	551 / 00		75	75
	551 / 00		100	200
		396.00		
Tangent	PT 554 / 96.00		100	200
	554 / 96.00		100	100
		178		
Curve	8°00' L PC 556 / 86.50		100	100
		912.50		
Tangent	PT 565 / 86.50		100	100
		227.50		
Curve	10°00' R PC 569 / 14		100	100
		180.00		
	570 / 00		100	100
	570 / 00		100	200
		589.00		
Tangent	PT 575 / 89		100	200
Tangent	PT 575 / 89		100	100
		227		
Curve	10°00' L PC 578 / 16		100	100
		292.50		
Tangent	PT 581 / 08.50		100	100
		91.50		
	582 / 00		100	100
	582 / 00		100	200

		Alignment of Center Line		Width of R. O. W.	
		Station		West of Center Line Ft.	East of Center Line Ft.
Curve	1°00' L	PC 597	632	50	50
		32	66.67		
Tangent		(PT 597 98.67 So. PT 598 97.94 No.)	460.23	50	50
Curve	3°00' L	PC 603	233.33	50	50
		58.17			
Tangent		PT 605 91.50	1108.50	50	50
Curve	5°00' R	PC 617	200	50	50
		00			
Tangent		PT 619 00	1108.52	50	50
Curve	4°00' R	PC 630	575	50	50
		08.52			
Tangent		(PT 635 83.52 So. PT 636 83.52 No.)	59.26	50	50
Curve	4°00' L	PC 637	557.50	50	50
		42.78			
Tangent		PT 643 00.28	229.72	50	50
Curve	4°00' R	PC 645	670	50	50
		30			
Tangent		PT 652 00	200	50	50
Curve	4°00' L	PC 654	500	50	50
		00			
Tangent		PT 659	981.26	50	50
Curve	2°00' R	PC 668	320	50	50
		81.26			
Tangent		PT 672 01.26	246.11	50	50
Curve	4°00' L	PC 674	500	50	50
		47.37			
Tangent		PT 679 47.37	301.17	50	50
Curve	3°00' R	PC 682	500	50	50
		48.54			

: Alinement of Center Line			: Width of R. O. W.	
:	:	:	: West of	: East of
:	:	:	: Center	: Center
:	: Station	: Distance:	: Line Ft.	: Line Ft.
		Ft.	:	
Tangent	PT 725 / 50	600		
Curve	3°00' R PC 733 / 32.88	782.88	50	50
Tangent	PT 736 / 66.21	333.33	50	50
Curve	3°00' L PC 738 / 32.88	166.67	50	50
Tangent	PT 741 / 66.21	333.33	50	50
Curve	4° 00' L PC 748 / 47.38	681.17	50	50
Tangent	PT 753 / 47.38	500	50	50
Curve	4°00' R PC 754 / 47.37	99.99	50	50
Tangent	PT 759 / 47.37	500	50	50
Curve	4°00' R PC 768 / 42.78	895.41	50	50
Tangent	PT 775 / 42.78	700	50	50
	777 / 00	157.22	50	50
	777 / 00		200	50
Curve	3°00' L PC 778 / 19.53	119.63	200	50
Tangent	PT 783 / 42.95	523.33	200	50
Curve	10°00' L (PC 784 / 14.63 So. =	71.57		
	(PC 785 / 29.05 No.		200	50
	PC 785 / 29.05 No.		50	50
Tangent	PT 788 / 29.05	200		
Curve	4°00' L PC 788 / 92.35	63.30	50	50
Tangent	PT 789 / 98.18	105.83	50	50
Curve	10°00' L PC 791 / 52.47	154.29	50	50
Tangent	PT 792 / 95.64	143.17	50	50
		515.26		

: Alinement of Center line:			Width of R. O. C.		
:	:	:	Distance:	West of	East of
:	Station	:	Ft.	Center	Center
:	:	:	:	Line Ft.	Line Ft.
Curve	4°00' L	PC 817 / 91.76	191.76	50	50
Tangent		Pt 821 / 25.93	334.17	50	50
Curve	8°00' R	PC 827 / 50	624.07	50	50
Tangent		PT 833 / 50	600	50	50
Curve	6° 00' L	PC 834 / 50	100	50	50
Tangent		PT 837 / 00	250	50	50
Curve	3°00' R	PC 838 / 89.67	189.67	50	50
Tangent		PT 841 / 08.56	218.89	50	50
Curve	2°00' L	PC 843 / 93.36	284.80	50	50
Tangent		PT 845 / 43.36	150	50	50
Curve	3°00' L	PC 851 / 73.84	630.48	50	50
Tangent		PT 855 / 90.51	416.67	50	50
		857 / 00	109.49	50	50
		857 / 00		100	50
Curve	2°00' R	PC 858 / 21.66	121.66	100	50
		860 / 00	178.34	100	50
		860 / 00		50	50
Tangent		PT 861 / 21.66	121.66	50	50
Curve	3°00' R	PC 861 / 99.25	77.59	50	50
Tangent		PT 865 / 99.25	400	50	50
Curve	5°30' L	PC 867 / 09.33	110.08	50	50
		870 / 00	290.67	50	50
		870 / 00		100	50
Tangent		PT 871 / 45.69	145.69	100	50
		872 / 00	54.31	100	50

Alinement of Center Line			Width of R. O. W.	
:	:	:	: West of	: East of
:	:	: Ft.	: Center	: Center
:	: Station	: Distance	: Line Ft.	: Line Ft.
	PT 887 / 00/89		100	50
Curve	8°00' L PC 888 / 32.55	131.65	100	50
		176.45		
West line of				
Lot No. 38 - Finch	890 / 09 /		100	50
Pruyn Property	(STOP)			
	(BEGIN)			
East line of				
Lot No. 38 - Finch	POC 923 / 43 / on 5° curve to			
Pruyn Property	right		50	50
Tangent	Azimuth PT 926 / 00	257	50	50
	36° 10'			
	referred			
	to true			
	meridian			
Curve	2°00' L PC 928 / 33.30	233.30		
		183.33	50	50
Tangent	PT 930 / 16.63		50	50
		2983.37		
	960 / 00		50	50
	960 / 00		100	100
Curve	3°00' L PC 962 / 10.42	210.42		
		252.78	100	100
Tangent	PT 984 / 53.20		100	100
		1885.81		
Curve	5°00' L PC 983 / 49.01		100	100
		462.57		
Tangent	PT 988 / 11.68		100	100
		1981.02		
Curve	4°30' L PC 1007 / 92.70		100	100
		1529.25		
Tangent	PT 1023 / 21.96		100	100
		1019.28		
Curve	2°00' L PC 1033 / 41.24		100	100
		700		
Tangent	PT 1040 / 41.24		100	100
		638.76		
Curve	8°00' R PC 1046 / 80		100	100
		611.25		
Tangent	PT 1052 / 91.25		100	100
		608.75		
Curve	4°00' R PC 1059 / 00		100	100
		765.42		
Tangent	PT 1066 / 55.42		100	100
		1134.58		
	PT 1072 / 00		100	100

NORTHERN DISTRICT OF NEW YORK }
STATE OF NEW YORK } ss.
COUNTY OF }

. being duly sworn, deposes and says that he
has read the foregoing and knows the contents thereof;
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belief are communications of the proper officers and agents of the
Government in the hands of deponent.

Sworn to before me
this day of

. 19

Notary Public

CIVIL No. 8431

United States District Court

NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

Plaintiff

220 ACRES OF LAND⁸⁸, MORE OR LESS,
SITUATE IN THE COUNTIES OF ESSEX
AND HAMILTON, STATE OF NEW YORK
AND THE STATE OF NEW YORK, et al.,

Defendants

ORIGINAL

COMPLAINT IN CONDEMNATION

THEODORE F. BOWES
U. S. Attorney,
Syracuse 1,
Binghamton, N. Y.

U. S. DISTRICT COURT
N. D. OF N. Y.
FILED

JAN 18 1951

AL... o'clock
G. A. PORTER, Clerk

[Handwritten signature]